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CLERK

SUPREME COURT OF THE UNITED STATES

October Term, A. D. 1940

S. Mayner Wallace
Petitioner
vs.
Johanna F. Fiske, *et al.*
No. 121

S. Mayner Wallace
Petitioner
vs.
Johanna F. Fiske, *et al.*
No. 122

Verified Motion for Leave To Dispense With the Filing and Printing of Unnecessary Portions of Two Records Below on Petition for (Two) Writs of Certiorari to the United States Circuit Court of Appeals (Eighth Circuit)

James C. Jones
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MAY IT PLEASE THE COURT:

Your petitioner, S. Mayner Wallace, a member of the Bar of this Court, also respectfully states that he is duly filing herewith in the clerk's office of this Court his typewritten Petition and supporting Brief for writs of certiorari, to the United States Circuit Court of Appeals for the eighth circuit, to review the orders of that court (under the FEDERAL RULES OF CIVIL PROCEDURE) dismissing (for want of jurisdiction) his certain cross-appeal and refusing to dis-

miss (and affirming) the main appeal, by the respondents hereto, in the following causes in that court:

Johanna F. Fiske, *et al.*, appellants, v. S. Mayner Wallace, No. 11,775 (main appeal)

and

S. Mayner Wallace, appellant, v. Johanna F. Fiske, *et al.*, No. 11,807 (cross-appeal)

Your petitioner further respectfully states that herewith he is also causing to be filed in the clerk's office of this Court a certified typewritten copy of all of the portions of the records of said causes believed by him possibly to be material for the review that is here sought; and, for *the reasons* below set forth herein, petitioner now respectfully moves to be allowed to have printed, and to proceed further herein upon, the said certified typewritten copy of the record.

Outline of the Case Below

In the litigation of "Ehrhardt W. Franz vs. Gustavus A. Buder, et al.," No. 6682, in the District Court of the United States for the eastern judicial district of Missouri, wherein there have been divers appeals to said Court of Appeals, the petitioner prayed for an assessment of counsel fees against the respondents (Johanna F. Fiske, Amanda F. Wheeler, Henrietta A. Holdoway, Adelaide M. Zimmermann, Otto B. Franz, Arthur U. Simmons, adm'r. c. t. a. of the estate of Gustav A. Franz, dec'd., Sherman H. Kleinschmidt and Helen Kleinschmidt) for compensation for legal services rendered to them in that litigation; and, after a trial in the District Court where much evidence was heard and judicial notice taken of all prior records in both Courts, a judgment for the petitioner was rendered.

From that judgment, both petitioner and the said respondents appealed to the Court of Appeals.

Petitioner moved to dismiss the appeal of respondents (upon the ground that the same, under the FEDERAL RULES OF CIVIL PROCEDURE, was prematurely taken within the first 10 days after the entry of a non-final judgment) but that motion was denied by the Court of Appeals—while petitioner's appeal to that Court was dismissed because not taken within 3 months from the date of judgment although same had been promptly taken after petitioner's timely motion, filed pursuant to the FEDERAL RULES OF CIVIL PROCEDURE, to modify that judgment, was denied in the trial court.

All of the Facts Presently Material

(The following record-references are, of course, to the said typewritten copy of the record now being filed with the clerk of this Court.)

Judgment for petitioner was entered in the District Court on March 30, 1940 (R. 8).

Within 10 days thereafter, on April 9, petitioner (asserting that the judgment was inadequate in amount) filed his motion (R. 10) to amend that judgment—pursuant to RULE 52 (b) of the FEDERAL RULES OF CIVIL PROCEDURE.

2 hours and 5 minutes prior thereto (in the same day) respondents had filed in the clerk's office of the District Court their notice (R. 9) of appeal from that judgment—pursuant to RULE 73 (a).

Petitioner's said motion was entertained by the District Court; and argued, submitted and overruled there on July 25 following (R. 12).

Thereafter, on the 29th of July, petitioner filed his notice (R. 13) of appeal from said judgment—also pursuant to said RULE 73 (a).

The Court of Appeals denied (R. 21) petitioner's motion to dismiss said appeal (numbered 11,775 therein) of the respondents. That motion (R. 17) assigned that, under the RULES, that appeal was prematurely taken from a non-final judgment.

The Court of Appeals, at the same time, sustained (R. 20) a motion of the respondents to dismiss petitioner's said cross-appeal (numbered 11,807 therein). That motion (R. 14) assigned that that cross-appeal was not taken within the statutory 3 months from said March 30th, the date of judgment.

The Rulings Below

The opinion (R. 22) of the Court of Appeals (on those motions) proceeded upon the view that "the mere existence" of the right of a party, under the RULES, to move within 10 days against a judgment does not deprive the other party "of the right to take an appeal" at once upon the entry of judgment; and that respondents' appeal, having been taken immediately prior (although during the same day) to the filing of petitioner's motion to amend, was legally effective and, also, that the petitioner should then have gone to the Court of Appeals and moved for a remand for the consideration of his said motion. (*Fiske, et al. v. Wallace* and *Wallace v. Fiske, et al.*, 115 F.—2d—1003.)

So far as we are aware, this is the first time that any of the questions here presented, under the FEDERAL RULES OF CIVIL PROCEDURE, has been considered.

The Questions

now sought to be reviewed here involve the proper construction of certain of the FEDERAL RULES OF CIVIL PROCEDURE.

Those questions are:

I

May a party file notice of appeal and effectively appeal from a judgment of the District Court, under RULE 73 (a), within the 10 days after judgment during which time, under RULES 52 (b) and 59 (b), the other party has the statutory right to move to modify the judgment or to move for a new trial; or, is any such attempt to appeal premature as being from a judgment that is not final?

The April, 1937, Draft of those RULES provided [in RULE 59 (b) thereof] that the pendency of such a motion to modify "*does not affect the finality of the judgment or suspend its operation*"; but that provision *was stricken from* the RULES as finally adopted by this Court.

And present RULES 59 (a, b & d), 60 and 62 (a) also show that a judgment *stands in suspense* during the first 10 days after entry.

II

Is an appeal taken during the 10th day (and 2 hrs. & 5 min. before the filing, during the same day, of such a motion to modify) legally effective in view of the law's usual disregard for fractions of a day?

As above stated, the Court of Appeals has ruled that the "mere" right of a party to move, within 10 days, against a judgment does not prevent an adversary party from immediately filing notice of appeal upon the entry of a judgment; and, consequently, that that court had jurisdiction of respondents' said appeal but did not have jurisdiction of petitioner's said cross-appeal because the latter was taken more than 3 months after judgment although promptly after the overruling of petitioner's said motion to modify.

The Lengthy Record Below

The said facts required, for this review here, are in nowise controverted.

All of the said facts appear in the foregoing opinion (R. 22) of the Court of Appeals now reported in 115 F. (2d) 1003.

Additionally, all of said facts are exhibited by the portions of the said records in the Court of Appeals that are contained in said typewritten record now being filed here.

Said typewritten record (of 61 pages) will comprise less than 55 printed pages whereas the entire record, in the Court of Appeals, comprises said two transcripts therein, Nos. 11,775 and 11,807, containing an aggregate of 433 printed pages together with more than 1150 printed pages of Exhibits therewith, and, additionally, the transcripts, on 9 separate prior appeals to that court, containing more than 1500 printed pages.

Stated otherwise: Of more than 3,000 printed pages, only about 55 printed pages of the entire record below are in anywise relevant to the instant application for certiorari.

Petitioner further states that the cost of certifying and printing said entire record in the Court of Appeals would be prohibitive of this application and that such record, if filed here, would, with the exception of said approximate 50 printed pages thereof, be entirely useless to and burdensome upon this Court.

The Record, for This Application, As Proposed by Petitioner

Said typewritten and certified transcript, now being filed here, comprises the following:

From the District Court: the petition of petitioner upon which judgment was entered; the judgment; findings of fact and conclusions of law; respondents' notice of appeal, filed

at 2:05 P. M., and petitioner's motion (for amendment of the judgment) filed at 4:10 P. M. on the same day; order overruling said motion; and petitioner's notice of appeal.

From the Court of Appeals: respondents' motion to dismiss petitioner's cross-appeal; petitioner's motion to dismiss respondents' appeal; orders dismissing petitioner's cross-appeal and denying motion to dismiss respondents' appeal; opinion on said motions; petition for rehearing; order denying petition for rehearing; order of submission of respondents' appeal; judgment of affirmance on respondents' appeal; opinion; petition for rehearing; and order denying said petition for rehearing.

Petitioner's Effort to Stipulate

Petitioner has proposed to G. A. Buder, Jr., Esq., and Jesse T. Friday, Esq., both of the St. Louis, Missouri, Bar, counsel for all of the respondents, that the parties stipulate the last above specified portions of the record (being the same matter now contained in said typewritten copy now being filed here) as the record to accompany this the petitioner's application for certiorari; but, after correspondence and consideration, said counsel, on May 19, 1941, refused to stipulate the said or any other record.

Said typewritten and certified copy of the record now being filed here, while requested by petitioner of the clerk of the Court of Appeals at once upon the said counsel's refusal to stipulate, was not furnished to petitioner until May 28, 1941.

Prayer

Wherefore, your petitioner respectfully moves and prays to be allowed to have printed, and to proceed further herein upon, his said typewritten Petition and supporting Brief, for writs of certiorari, and upon the said certified typewritten record (comprising the matter, from said transcripts Nos. 11,775 and 11,807, in the Court of Appeals, and

specified above under the title of "*The Record, for this Application, as Proposed by Petitioner*") now being filed with the clerk of this Honorable Court; and your petitioner will ever pray, *etc.*

Respectfully submitted

S. MAYNER WALLACE
Petitioner and Movant

By JAMES C. JONES
LON O. HOCKER
FRANK Y. GLADNEY
JOSEPH H. GRAND
Counsel for Petitioner

St. Louis, Mo.
May, 1941

Verification

United States of America
Eastern Judicial District of Missouri } *ss:*
The City of St. Louis

The Affiant, S. Mayner Wallace, petitioner and movant in the foregoing MOTION, being duly sworn, upon his oath states that the facts therein stated are true and that the matters and things, therein stated upon information and belief, he believes to be true.

S. MAYNER WALLACE
Affiant

Subscribed and sworn to before me this 29th day of May, A. D. 1941.

My commission expires on August 25, 1944.

Notarial Seal

A. M. MENZI
Notary Public within and for The City of
St. Louis, State of Missouri